It is genuinely interested and will be substantially affected by the decision of the questions which are presented in this suit. The Solicitor General of the United States and counsel for the Petitioner have assented to the filing of this brief, and their assents are filed herewith.

Respectfully submitted,

MALCOLM DONALD.

March 19, 1937.

In The

Supreme Court of the United States

October Term, 1936.

No. 667.

Anniston Manufacturing Company

v.

Harwell G. Davis,
Collector of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT.

This brief is filed on behalf of Pacific Mills by Malcolm Donald as *amicus curiae,* and counsel.

For a statement of proceedings, we refer to the brief of petitioner.

To avoid repetition of arguments, we shall confine ourselves to one point:—

Underlying the decision of the Court of Appeals is the assumption that Congress had power by statutes prospective in operation to *abolish the common law*

under which a right of action would accrue *against a revenue officer* to recover money exacted under color of office but in excess of authority, and paid under duress and protest, and *substitute a statutory system of law* whereby on the occurrence of the same or a different set of operative facts a right of action would accrue *against the United States, with the remedy*—suit against the United States or its nominee—*in the unlimited control of Congress.*

Our point is, that the assumption is unsound, its doctrine susceptible of application to the whole field of federal power in situations where government comes in conflict with the individual, with results disastrous to the security of private rights and the integrity of the Constitution.

SUMMARY OF ARGUMENT.

The public importance of this proceeding lies in the fundamental, although unexpressed, assumption of the Court of Appeals, that Congress had had the power to abolish the common law which allowed a right of action against a revenue officer for the recovery of moneys illegally exacted, and to substitute a statutory rule under which a right of action might accrue solely against the United States, enforceable by suit against the United States or its nominee, but only so long as Congress might permit.

If Congress had the assumed power, it also possesses power to enact that no public officer, civil or military, shall be personally liable for acts which invade private rights, and to substitute a statutory law giving the wronged individual a right of action against the sovereign itself, which right the sover-

eign is not bound to allow to be the basis of suit in any court.

The effect of affirming that Congress possesses such a sweeping power would be two-fold.

It would leave the citizen in his relations to Government at the mercy of Congress, with a remedy available only at the pleasure of Congress. It would leave to Congress, which had enacted a statute, the power to say whether or not its constitutionality should come before the courts for review.

Our contention will be that Congress does not possess the power attributed to it by the Court of Appeals, and that the exertion of such a power, if possessed, would be fraught with the most serious consequences both to individual rights and to the structure of our Government.

We concede that Congress might have changed the common law, by altering the operative facts upon the happening of which a right of action should accrue *against the collector*, provided the right of action thus allowed remained substantially adequate. Indeed, this is what Congress, in establishing its "system of corrective justice" had done, and thereby had recognized, and not defied, a principle of jurisprudence which is fundamental in our governmental system, which is that public officers do not share the sovereign immunity, and are not protected by their offices, but must answer for their acts in courts of justice, whenever such acts invade private rights.

* * * *

This Court in *United States* v. *Butler*, 297 U. S. 1, held that the processing and floor stocks taxes were illegal exactions lacking the quality of a true tax; that they were a means for effectuating the regula-

tion of agricultural production, a matter not within the power of Congress. *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110, 113.

The Agricultural Adjustment Act was not a law and the so-called tax was not a tax. The Act conferred no right upon the Collector to exact processing and floor stocks taxes from the plaintiff. It imposed no duty upon him nor afforded him protection as an individual from the consequences of his acts. *Norton* v. *Shelby County*, 118 U. S. 425, 442; *Hopkins* v. *Clemson College*, 221 U. S. 636.

> "To take a man's property under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but unlawful confiscation."
>
> *People* v. *State Treasurer*, 23 Mich. 499, 502;
>
> *Frick* v. *Pennsylvania*, 268 U. S. 473, 488.

It was never the design or purpose of the framers of the Constitution that the Congress should establish agents of the federal government in the several states and then command them to collect from the citizens of the several states an unlawful exaction in the guise of a tax. If a man voluntarily accepts a position in the revenue service of the United States he must assume the risk that he may be called upon by his superiors to enforce illegal exactions; and that if that situation arises he must either disobey instructions, or invade private rights and thereby subject himself to personal liability. Of course if he follows instructions and sustains loss he is entitled to indemnity. Such was the common law. *Tracy* v. *Swartwout*, 10 Peters, 80, 98-99; *Elliott* v. *Swartwout*, 10 Peters, 137, 154.

If illegal taxes are collected and deposited in the Treasury, the detention of the money by the United States is immoral. *Bull* v. *United States,* 295 U. S. 247, 260. A duty to make restitution arises, and a corresponding right to refund accrues to the aggrieved party. But since the United States enjoys sovereign immunity it cannot be impleaded without its consent. Until such consent is given, the aggrieved party, as against the United States, has a right without a remedy. And it is the doctrine of this Court that if consent to sue be given it is a privilege, and not a right protected by the Fifth Amendment. *Lynch* v. *United States,* 292 U. S. 571, 581. Consent may be withdrawn although the effect is to render unenforceable a vested right.

The right of action which the common law gave against the Collector, once vested, became property protected by the Fifth Amendment from the arbitrary exertion of governmental power, and the injured person was not dependent, for his remedy, upon the consent of Congress.

* * * *

It was the doctrine of the Court of Appeals that the common law had been abolished before the plaintiff paid the money he seeks to recover in this action, and that the only law left to him and applicable for redress against the illegal exaction, was a statutory law which permitted a right of action solely against the United States. For the enforcement of that right he might sue either the United States directly, or sue the Collector; but, if he sued the Collector the Collector was sued in a representative capacity only, not as an individual.

It is our contention that Congress was without power to take away from persons within a state the benefit of all law under which a right of action would accrue to them against another person within the state who might illegally collect money from them under color of office.

* * * *

There could have been no public policy served by so changing the law that never could Collectors be personally liable; the attempt to make such change, if it had been made, would have been outside of the delegated powers of Congress, and in violation of the Fifth Amendment.

We are well aware of the doctrine that taxes are the life-blood of the nation, and their prompt collection a matter of public exigency. The same does not hold true of illegal exactions. To permit illegal exactions to be made under the guise of taxes directly encourages the enactment of taxing acts of doubtful constitutionality, the piling up in the Treasury of huge sums of money, and their expenditure for unlawful purposes; tempts the conscience of the sovereign to exert devious means to avoid restitution, and by specious arguments to convert an immoral detention into righteous possession. But since it cannot be known until the final adjudication of this tribunal whether an exaction is or is not illegal, we may concede that provisions designed to prevent delay in collection of exactions demanded by Congress, although an extreme use of power, have been sustained as valid exercises of the power of Congress, applicable to all exactions, whether legal or illegal, pending final determination of the question of constitutionality. Forbidding the use of injunctions in tax cases is sustainable, but represents the limit to which the power of

Congress over remedial law may be supposed to extend.

The very fact that in tax cases execution precedes judgment makes all the more necessary the strict maintenance of rights and remedies for the recovery of money illegally exacted.

It was within the scope of the power of Congress to collect taxes, to impose conditions designed to facilitate investigation, to prevent the prosecution of stale claims, to indemnify the Collector against acts done under instructions, or otherwise with probable cause. It was within the power of Congress to dispense with the requirement of duress and protest, because that also facilitates collection, and recognizes what is the practical truth, that there is an implied duress wherever the individual is called upon to pay taxes and knows that if he does not pay them they will be collected by summary process with the addition of penalties and high interest charges for non-punctuality.

But none of these reasons of public policy can justify the total abolition of those salutary rules of common law which made the individual responsible for the invasion of private rights, even although such invasion was in the name of authority, and even in the belief that the authority was rightfully wielded. To exert such a power is never necessary nor proper in the collection of taxes; it is not an aid to the collection of taxes, but an aid to the immoral detention of money illegally collected. If no right of action can accrue against the Collector personally, the individual who never had the benefit of injunctive process to test, before payment, his liability to an exaction, is thrown for his remedy to the enforcement of his right against the United States and thereby subjected to the whim or caprice of the very body which

ordained that the unconstitutional exaction should be imposed and collected.

The ancient common law which made the officers of the King individually responsible and which was in force in this country at the time of the adoption of the Constitution, the basic principle that there should be a remedy for every wrong, and that confiscation by unlawful taxation is in violation of the Fifth Amendment, combine with other weighty considerations to throw the mantle of protection of the Fifth Amendment over the right of action against an individual unlawfully exacting money under color of official authority. To strike down this ancient protection afforded by the common law, is not to aid the collection of taxes, but is to aid in the confiscation of property.

The personal liability of public officers acting in excess of authority, either because the statute under which they pretend to exert authority is unconstitutional, or because they exceed the bounds of a valid statute, is a doctrine of the utmost importance to our system of constitutional government.

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."
>
> "It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."
>
> (Mr. Justice Miller, in *United States* v. *Lee,* 106 U. S. 196, 220.)

If it had been within the power of Congress, as the Court of Appeals assumed, to abolish the common law which permitted recovery against the Collector, it would be equally within the power of Congress to exempt from liability public officers of every kind,—military, naval and civil, in every department of the government, and leave the individual wronged by illegal, unconstitutional invasions of property rights at the mercy of a central government which might or might not, in its mercy and beneficence, maintain for them the privilege of bringing suit against the United States. If the individual may lawfully be left to entreat Congress for what he might formerly have demanded from the Collector, if supplication alone may remain to the citizen despoiled by confiscations, there is no limit to the variety and number of illegal exactions which Congress may impose. In the case of the imposition of a direct tax without apportionment, or a tax upon exports, how is the validity of the exaction to be tested unless action may be brought as of right against the individual responsible for enforcing the confiscatory and unconstitutional legislation?

It must be clear that the flow of litigation affecting fundamental rights, which makes possible the exertion of the power of judicial review to maintain the balance between the states and the nation, the separation of powers and the constitutional rights of the individual, would be dried up at the source if no cases or controversies could be brought before the courts except those permitted to be brought by the organ of government responsible for the challenged legislation.

If the recovery of property confiscated by agents of the government acting pursuant to an unconsti-

tutional federal statute and the opportunity to test the validity of such statute, is to be left to the unhampered discretion of the body that enacted the challenged law, it spells the end of right vindicated through the law and leaves to the citizen only entreaty. It reduces the Constitution to pious words, not a command from the people obligatory upon all departments of the government.

> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights."
>
> (Mr. Justice Miller, in *United States* v. *Lee*, 106 U. S. 196, 221.)

* * * *

I.

THE ISSUE TO BE DISCUSSED IS WHETHER THE DESTRUCTION OF THE PERSONAL LIABILITY OF PUBLIC OFFICERS WAS WITHIN THE POWER OF CONGRESS, AS APPLIED TO COLLECTORS OF INTERNAL REVENUE.

The Court of Appeals denied redress to the plaintiff not because it had failed to state a cause of action against the defendant in conformity with statutory provisions, which was not denied; not because the Court believed that the limitations of Title VII were applicable and valid, upon the discussion of which question the Court felt it "could not enter"; not because Congress had exerted its control over the Federal Judiciary to withdraw jurisdiction of the action from the Federal courts; but because the suit was "in reality not against the appellee but against the United States", for which the Collector was a mere "proxy", and the consent of the United States to the maintenance of the suit had been withdrawn.

That Congress possesses the power as agent for the sovereign, to grant, condition, withhold and withdraw the consent of the United States to be impleaded; that consent, although once given, may be withdrawn although vested rights are thereby rendered unenforceable (*Lynch* v. *United States*, 292 U. S. 571, 581); that withdrawal of consent deprives any court in which an action against the United States is pending, of jurisdiction; we do not deny.

Nor do we contend that if the Collector *was* a "proxy"—a mere representative of the United States for purposes of suit, that Congress' power to with-

draw consent was less than it would have been had the suit been against the United States by name.

The issue we shall discuss is whether the destruction of personal liability of public officers was within the power of Congress, as applied to the Collector of Internal Revenue.

* * * *

By the phrase "destruction of personal liability of public officers" we refer, and hereafter shall refer, to legislation by Congress in the following situation:

Prior to the legislation, under the law of a State, a right of action will accrue against a public officer personally, upon the occurrence of a certain "aggregate of operative facts." Congress then, by an act or acts prospective in operation, provides that no right of action against the public officer personally shall accrue, but that upon the happening of the same, or a different, set of facts, a right of action against the United States shall accrue, with a remedy by suit against the United States, or an officer of the United States representing the United States for purposes of suit.

Of course it is conceivable that Congress might provide by an Act, prospective in operation, not only that there should be no liability on the part of an officer of the revenue to respond in damages to a person injured by the enforcement of an unconstitutional exaction in the guise of a tax, but *also,* that there should be neither right nor remedy against the United States. But, to thus simultaneously prevent any right and remedy, either against the United States, or against the enforcing officer, from ever accruing, would be clearly arbitrary, unconstitutional and void.

It is the technique of substitution, and SUBSEQUENT *extinction of remedy which is insidious, and which we propose to consider.*

The substitution of a right and remedy against the sovereign for a right and remedy against the enforcing officer, to be prospectively applied when injury occurs, has a superficial appearance of fairness and adequacy, and the legislature may intend, at the time the statute is enacted, to make a fair and adequate provision. But legislatures may change their minds. It may be inconvenient, after large sums of money have been collected under an unconstitutional act, to pay them back. *It is the uncontrolled power of Congress, in the name of the sovereign, to withdraw consent to be sued after the injury has been done, which is the instrument by which injustice may be successfully perpetrated. Our definition of "destruction of personal liability of public officers" refers to prevention of the accrual of future personal liability of public officers,* PLUS *a provision substituting sovereign liability, and consent to be sued.*

* * * *

In the phrase "personal liability of public officers" we include several principles:—

(1) That an officer does not share the immunity of the sovereign whose agent he is;

(2) That action or suit against an officer is not by reason of that fact alone a proceeding against the sovereign or one to which the sovereign is an indispensable party;

(3) The defendant to a suit or action is not protected from liability *in* that proceeding by

(a) The fact that he is a public officer and that the acts complained of were by color of office;

(b) The fact that he was enforcing a statute, unless

(i) the statute is constitutional with respect to the acts complained of; and

(ii) the acts were within the scope of power conferred by the statute;

(c) The fact he was executing instructions of a superior, unless the superior had lawful power and authority to give the instructions, within the terms of a valid statute.

* * * *

We admit that Congress might have abolished the common law under which rights of action might accrue against a Collector of Internal Revenue for illegal exactions, and substituted therefor a statutory law giving a right of action *against the Collector* dependent upon a different aggregate of operative facts; or Congress might without abolishing the common law have added to or subtracted from the critical facts upon which the right of action against the Collector depended, provided the substituted right of action were adequate. We assert that one of these things Congress did—it is immaterial which—rather than substitute for the common law a statutory law under which no right of action could arise against the Collector, but only against the United States.

We do not propose to discuss the proposition that it was never the intention of Congress, by legislation passed prior to the payment of the money involved in this suit, nor the necessary effect of the

operation of that legislation, to prevent the accrual of a cause of action against the Collector personally. The statutes and decisions are fully discussed in the brief of petitioner. *We endorse their argument.* Nor do we consider the power of Congress, after a cause of action has accrued against the Collector personally, to strike down that cause of action either with or without substituting the United States as a defendant. With this compulsory novation we are not here concerned. That a right of action, once accrued, is *property* which cannot, consistently with the Fifth Amendment, be destroyed or substantially impaired, we regard as settled law.

It is our purpose, rather, to show the far-reaching and disastrous consequences of adopting the unexpressed assumption of the Court of Appeals that Congress ever had possessed the power, by legislation prospective in operation, to prevent the accrual of any right of action against the Collector personally; and that the assumption was unwarranted in law.

II.

THE DESTRUCTION OF THE PERSONAL LIABILITY OF A PUBLIC OFFICER, AS APPLIED TO A COLLECTOR OF INTERNAL REVENUE IN THE CASE OF AN UNCONSTITUTIONAL EXACTION IN THE GUISE OF TAX, IS NOT WITHIN THE POWER OF CONGRESS.

A. NOT COMPRISED WITHIN THE POWER DELEGATED TO CONGRESS TO COLLECT TAXES.

Personal liability of public officers was a doctrine of common law, and as such prevailed in the several states at the time of the Revolution and thereafter. The Constitution and laws passed pursuant thereto are the supreme law of the land, and consequently any necessary or proper provisions in aid of the collection of taxes would supersede common law in the several states so far as inconsistent. Legislation passed by Congress to effectuate the collection of taxes has resulted in a multiplicity of laws and a large organization to administer those laws. But with respect to the liability of the Collector, the legislation may be divided into four classes:—

(1) Laws regulating the relations between the Government and the Collector, such as provisions requiring that receipts be paid immediately into the Treasury, that the Commissioner may indemnify the Collector for judgments obtained against him, that upon certificate of probable cause no execution shall issue against the Collector, but the judgment be paid out of the proper appropriation in the Treasury.

(2) Provisions designed to facilitate the investigation of claims, to regularize procedure, and to prevent the prosecution of stale claims,—such as the requirement of a preliminary appeal or claim for refund, regulations prescribing the form of such claims, and limitations of time for filing claims, and bringing action. The abolition of the requirement of protest is possibly due to a recognition of the fact that a claim for refund serves the purpose of a written protest.

(3) The abolition of the requirement of duress in 1924 may be attributed to two causes:—(a) recognition that penalties and a high rate of interest for delinquencies coupled with the established policy of the government to enforce payment by distraint, exerted strong pressure on the taxpayer, and (b) that to require the taxpayer, in order to be certain of proving duress, to wait until threatened with distraint of his property, was not only injurious to the taxpayer, but retarded collections.

(4) Provisions designed to prevent the use of legal process to delay payment. Revised Statutes, sec. 3224, prohibiting injunctions, is the principal provision of this sort. The reasons for permitting injunctions where the tax is challenged on the ground of unconstitutionality are that taxes are the "life blood of the nation," and that due process, in the procedural sense, permits execution before judgment in the collection of the revenues, while presupposing a right and the maintenance of an adequate remedy, to recover money illegally exacted.

It is submitted that the prohibition of injunctions where unconstitutionality is alleged, goes to the limit of what should be permitted under a government of

limited powers. Where the challenged exaction involves large sums of money, and has a sweeping effect upon industry, we believe that it would be of greater social utility to permit the use of injunctions, with proper security, to secure a prompt adjudication of the question of constitutionality, rather than to permit collections to be made over a long period of time, with the grave consequences which follow the possession by the Government of vast sums of money to which it is not entitled.

The destruction of the personal liability of Collectors of Internal Revenue would serve none of the purposes outlined above.

In *Cary* v. *Curtis*, 3 How. 236, 245, the decision was put on two grounds: first, the right to assert sovereign immunity, and, second, control over the jurisdiction of the Federal Courts. Both grounds are untenable.[1]

It is significant that the opinion of the majority does not even intimate that Congress, in the exertion of power to collect taxes, could exempt the Collector from personal liability. If the decision is to be sustained, it must be upon the theory that under the *power to regulate foreign commerce* Congress might exert a power of exclusion, as under an embargo, and impose conditions upon which goods might be admitted. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 191; *U. S.* v. *Marigold*, 9 How. 560, 566; *The Abby Dodge*, 223 U. S. 166; *Buttfield* v. *Stranahan*, 192 U. S. 470;

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[1] Actions at common law in the state courts had been maintained against Collectors of customs since the organization of the Government without consent of Congress. The power over the jurisdiction of Federal Courts could not have prevented the maintenance of an action in a state court. There had been no plea to the jurisdiction.

Oceanic Navigation Co. v. *Stranahan,* 214 U. S. 320; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714-715. Justice Story, who, with Justice M'Lean, dissented in the Cary case, was undoubtedly the most profound constitutional lawyer then on the Supreme Court bench. Congress, in session when the decision was rendered, by the Explanatory Act of 1845 (5 Stat. 727), without any recorded dissent, nullified as far as it could the effect of the decision, and specifically provided that the 1839 Act, which was the basis of the decision, should not take away, or be construed to take away or impair the right to maintain any action at law against the Collector, "and to have a right to a trial by jury, touching the same, according to the due course of law".

Since an unconstitutional exaction is not a tax, and since exempting the Collector from liability to refund moneys illegally collected is not necessary as a means of preventing the obstruction of collections, the power to collect taxes does not embrace legislation exempting the Collector from liability to respond in a money judgment to persons whom he, under color of his office, has deprived of property through the enforcement of an unconstitutional statute.

B. REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

(1) *Because it is outside the field of Federal power.*

No Federal legislation can constitute due process which is outside of the field of federal power. Due process of law in the Fifth Amendment

> "... refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law." (*Hurtado* v. *California,* 110 U. S. 516, 535.)

A right in property which is protected by the Constitution cannot be lawfully *extinguished* by Congressional action. Congress, when it directs a collector to collect an unconstitutional exaction in the guise of a tax, is ordering an *invasion* of the right. It amounts to confiscation, which is repugnant to the due process clause.

(2) *Because it is violative of that fundamental principle of right and justice which prescribes that there should be a remedy for every wrong.*

The Fifth Amendment, like the Fourteenth Amendment, was designed to protect certain fundamental principles of right and justice, and the right to have redress for an unlawful deprivation of property cannot be denied without violation of such fundamental principles. Chief Justice Taft, delivering the opinion of the majority of the Court in *Truax* v. *Corrigan,* 257 U. S. 312, said, with reference to a state statute which had been construed to permit a *subsequent* interference with the plaintiff's business whereby it was reduced from $55,000 a year to $12,000 a year,

> "A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process, and can not be held valid under the Fourteenth Amendment.

"The opinion of the State Supreme Court in this case if taken alone seems to show that the statute grants complete immunity from any civil or criminal action to the defendants, for it pronounces their acts lawful." (p. 328).

* * * *

". . . The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement. It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles." (pp. 329, 330).

The case of *Burrill* v. *Locomobile Co.*, 258 U. S. 34, denied recovery against the State Treasurer of Massachusetts for collection of an illegal tax where the plaintiff had *failed to avail itself* of an exclusive remedy against the Commonwealth provided by *state statute*. The court did not need to go further than to hold that the remedy against the treasurer was in suspense so long as the state offered a remedy against itself fair and adequate. The court took pains to point out in that case that the right to modify the common law is not absolute, stating (p. 39):

> "But the common law of Massachusetts is not superior to its statutes and may be modified by them at the pleasure of the State, *at least until in some substantial sense it impairs substantive constitutional rights which it has not attempted to do.*" (Emphasis supplied.)

The reserved power of the State over common law is more sweeping than the power of Congress, which is limited to the field of delegated federal power.

* * * *

The colonists identified certain *basic principles* of the common law with the "rights of Englishmen". These basic principles, in their understanding, constituted the "law of the land" which is synonymous with "due process of law".

"There is also little question,"

says Mott,

> "that the colonists looked upon the 'law of the land' as being the common law of England and that it embodied the general rights and privileges of Englishmen." (*Due Process of Law*, p. 142.)

Whether the provisions of Magna Charta from which the due process clause was derived actually held this meaning in English law is immaterial. It is clear that it is the meaning attached to the provisions by the colonists in framing the State and Federal Constitutions that governs.

> "In so far as they gave it a content, it was this meaning that they transferred with it to the American State Constitutions and later to the Federal Constitution in the Fifth Amendment." (*Id.* at 136.)

One of the basic principles of the common law was that there should be a remedy for every wrong. So fundamental was this conception that in the Massachusetts Declaration of Rights it received separate recognition:

> "Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character." (Article XI.)

The first edition of Blackstone was published some years before the adoption of the Fifth Amendment and had wide currency and great authority in the colonies. Chief Justice Marshall quoted Blackstone in *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803):

> "In the third volume of his Commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.
>
> 'In all other cases,' he says, 'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.'
>
> And afterwards, p. 109, of the same volume, he says, 'I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

A person injured by the enforcement of an unconstitutional act of Congress may not *claim as a right* that consent to sue the United States, granted before the injury occurred, shall be *maintained for his benefit*. Such consent is a *mere license, revocable at the pleasure of the wrongdoer*, and therefore *lacks the essential quality of a true remedy*.

(3) *Importance should be attached in cases of unconstitutional taxation to the historical background of the Fifth Amendment.*

It is a well known historical fact that the first Ten Amendments comprising the "Federal Bill of Rights" were insisted upon by those who feared an invasion of civil rights and state autonomy, and were enacted as the price of ratification. Importance should be attached to the fears and apprehensions of arbitrary rule which these amendments were designed to allay. The claim of Parliament to impose internal taxes in the Colonies was regarded as conflicting with the rights of Englishmen and was one of the major causes of the Revolution. That the small farmers and others who opposed ratification of the Constitution saw in the proposed federal government a possible instrument of oppression substituted for the rule of England from which they had freed themselves, is well known to students of our history. Fear of unjust and illegal taxation was one of the principal motives of the opposition. Contemporary documents show this. For example: the writings

of Luther Martin[1] in Maryland and the series of letters published under the name of "Centinel"[2] in Pennsylvania, as well as the debates in the Ratification Conventions.

Since the actions against revenue officers for illegal collection of taxes were an established part of the common law at the time of the ratification of the Constitution, it may well be deemed that those who framed and ratified the Fifth Amendment considered the non-immunity of revenue officers to be one of those basic fundamental principles embraced in the conception of due process. To permit the federal government to establish officers in the several states and then endow them with non-liability, no matter what arbitrary and unconstitutional taxing statute they undertook to enforce, was the very sort of thing which those who demanded the Bill of Rights desired to protect themselves from, both by the Fifth and Tenth Amendments.

C. IT EFFECTUATES AN UNLAWFUL INVASION OF THE RESERVED POWERS OF STATES.

Not only does such attempted federal abolition of liability imposed by state law deprive the citizen of protection against arbitrary invasion of his constitutional right to security of property, but it also interferes with the power of the state to promote the general welfare of its citizens by affording them adequate means of protection through the courts, according to the common law. The common law, at the time of the framing of the Federal Constitution, was

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[1] Printed in Farrand, *Records of the Federal Convention*, Vol. III; refer, for example, to pp. 151, 159.

[2] Printed in McMaster & Stone, *Pennsylvania and the Federal Constitution*; refer, for example, to letter V, at p. 610.

the common law as it existed and was enforced in each of the several states. It was the ancient instrument by which Government, through the courts, undertook to protect rights of life, liberty, and property, and regulate the social and economic relations of the citizens. The state, of course, had and has the right to change the common law, consistently with fundamental principles of justice and equity; but in view of the conditions of the times, the fear of consolidation which was everywhere present, coupled with the fear of unjust, oppressive and illegal taxation, it is reasonable to conclude that those who framed and ratified the Tenth Amendment would have regarded the destruction of individual liability of officers enforcing unconstitutional exactions, under authority of the central government, to be not only an invasion of private right, but an interference with the power and duty of the state to protect its citizens.

III.

THE CONSEQUENCES OF PERMITTING THE DESTRUCTION OF PERSONAL LIABILITY OF A PUBLIC OFFICER WOULD BE TO PERMIT THE CONFISCATION OF PRIVATE RIGHTS IN PROPERTY IN THE WHOLE FIELD OF POWER WHEREIN THE SOVEREIGN, THROUGH ITS OFFICERS, IS BROUGHT IN CONFLICT WITH THE PUBLIC.

The state is an ideal entity; it can act only through persons—its officers and agents. It is immune from suit for wrongs committed in its name, unless, through the legislature, it consents to suit. The consent does not confer a right, protected by the due process clause, but a revocable license. When an unconstitutional law is enacted, those who enforce it are not wielding the authority of the state, because the legislature can commit the state only to constitutional acts. The enforcing officer is therefore deprived of justification. He is liable individually to the person who has been injured. Neither his office, nor the "apparent validity" of the statute, protects him; he cannot claim the immunity of the state, nor is an action against him an action against the state. When the cause of action accrues, it is property, protected by the due process clause.

Such is the doctrine of our law.

Opposed is the theory of public rule which would permit the destruction of the personal liability of public officers, so that no right of action against them could ever vest. It would give the injured party a right of action against the sovereign, enforceable only

if and when the legislative body, which had imposed an unconstitutional exaction, might see fit.

The founders of our government intended that security in life, liberty, and property, should forever remain free from arbitrary acts of government, and protected from attack through the usurpation of power. So long as the doctrine of the personal liability of public officers remains unimpaired there will always exist a remedy, either preventive or compensatory, or for specific restitution, against unconstitutional invasions of private right. Within the field where the principle of personal liability of public officers is enforced, constitutionally protected rights may be vindicated against the arbitrary exercise of power. The field where that beneficent principle applies is the zone of safety.

But if the right of the individual to be secure in life, liberty or property has been invaded by officers of government, or is threatened with invasion, and the injured party is obliged to recognize that the enforcing officer is exempt from all liability, and he must look for satisfaction to the sovereign, and employ the means of redress which the sovereign in its bounty may choose to bestow upon him, then those rights, although designed to be protected by the constitution, are in a zone of peril.

And the reason for this is so plain that it cannot be misunderstood,—a right which can be enforced only with the consent of the wrongdoer is in no true sense protected. If the debtor may say when he will pay his debt, or whether or not he will pay it at all, or pay it in part only; if he may say to the creditor, "You may not sue me until I am ready to be sued, and may recover only as much as I permit you to recover", there is in no real sense, a sanction for the obligation.

One who is apparently obligated to do an act by virtue of a written instrument, is obligated in a technical sense merely, if he can dictate whether or not the obligation may be enforced.

Therefore we say, that to take the right of the individual to security in life, liberty and property out of the zone of safety and put it in the zone of peril, to take it out of the field wherein a remedy is available in the due course of justice, and place it in the field where the remedy is dependent upon the bounty of the wrongdoer, is to defeat the intention of those who framed and ratified the Federal Bill of Rights.

It is true that the control of Congress over sovereign immunity is limited to the *remedy*. Theoretically the *right* against the sovereign may continue to live, but its life is pale, frustrated and unsubstantial. A right without a remedy is a mere phantom of jurisprudence, which can give no redress for an unconstitutional deprivation of property.

The exaction of money, or the confiscation of other property, through the acts of governmental agents enforcing an unconstitutional statute is a violation of a fundamental right, a taking of property without due process of law. For such acts, under the salutary doctrine of the common law, the agent is liable personally. He is a wrongdoer—although guilty of no moral fault. One who voluntarily assumes public office, for the sake of its emoluments or its power, is subject to the corresponding burden, of justifying at his personal risk, the laws which he enforces. This is a rule of sound public policy. For such personal loss as he may suffer, where he acts with reasonable cause, or by direction of his superiors, the Government owes him a duty to indemnify him. Such is the safe and reasonable doctrine.

If the legislature may say that the law which formerly made such acts a legal wrong, shall no longer be the law, it follows that the officer is not only exempt from a money judgment, *but may not be enjoined against the commission of such acts.* This is so because the jurisdiction in equity in such cases is not based on the enforcement of a right created under the substantive law of equity, but is an adjective jurisdiction, remedial solely, designed to supplement legal remedies where the remedy at law is inadequate. If, under legislative fiat, no legal wrong can ever be attributed to the officer, he is exempt from injunctions as well as from actions for damages.

To commit all remedies, legal or equitable, to the pleasure of the sovereign as represented by the legislature, is the essence of arbitrary rule. The legislative control over sovereign immunity is an instrument of power unique and unlimited. To trust the protection of private rights to the exertion of this power, is to confide them to the unrestrained discretion of the same body which has passed the unconstitutional statute under which the citizen's rights have been invaded.

We shall cite typical cases to illustrate the wide scope and importance of the doctrine of the non-immunity of public officers. The following cases deal with acts done in excess of statutory authority or under a statute which was unconstitutional, or which were otherwise lacking in legal justification, and hold the enforcing officer not immune from suit and/or not exempt from liability in a suit.

The action of trespass as a remedy against illegal seizures in connection with customs revenue is of great antiquity, there being instances of its use as early as the reign of Edward I. (Hall, *Customs Rev-*

enue, Vol. 2, p. 42, quoted in Freund, *Administrative Powers over Persons and Property,* p. 248.)

In *Mostyn* v. *Fabrigas,* Cowper 161, (1774), action was maintained against the governor of Minorca for assault and false imprisonment for acts done in the suppression of mutiny.

The familiar cases of *Elliott* v. *Swartwout,* 10 Peters 137, *Tracy* v. *Swartwout,* 10 Peters 80, *Bend* v. *Hoyt,* 13 Peters 263, state the doctrine of the common law with reference to actions against public officers for the recovery of money illegally exacted, with citation of authorities.

In *Wise* v. *Withers,* 3 Cranch 331 (1806), an arresting officer serving warrant of distress of court martial to satisfy a fine levied upon person exempt from military duty was held liable in trespass, since the court was without jurisdiction. Chief Justice Marshall said "The court and the officer are all trespassers." (p. 337.)

In *Little* v. *Barreme,* 2 Cranch 170 (1804), the Captain of American frigate was held liable for the seizure of Danish vessel, although acting under instructions, since the instructions could not "legalize an act which, without those instructions, would have been a plain trespass." (p. 179.)

In *Gelston* v. *Hoyt,* 3 Wheat. 246 (1818), a Collector of Customs was held liable for the seizure of a ship for an alleged violation of neutrality laws, where no such violation had occurred.

In *Teal* v. *Felton,* 12 How. 284 (1851), a local postmaster was held liable for conversion of a newspaper, as claim for excess postage was not countenanced by the Act of Congress under which he sought to justify.

In *Slocum* v. *Mayberry*, 2 Wheat. 1 (1817), an action against a surveyor of customs and collector to replevin the cargo of vessel detained under an embargo act, was maintained, since the Act applied only to the vessel and not the cargo.

In *Meigs* v. *McClung's Lessee*, 9 Cranch 11 (1815), an action of ejectment against military officers to recover possession of land on which the United States had erected a fort, was maintained.

And see *Wilcox* v. *Jackson*, 13 Peters 498; *Grisar* v. *McDowell*, 6 Wall. 363; *United States* v. *Lee*, 106 U. S. 196; *Brown* v. *Huger*, 21 How. 305.

In *Osborn* v. *Bank of United States*, 9 Wheat. 738, the Auditor and Treasurer of the State of Ohio were obliged to make restitution of the amount of an unconstitutional tax illegally collected and in their possession, and were enjoined from further collections of the tax.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, detinue was held to lie against Treasurer of the City of Richmond for desk distrained in collection of tax, where the defendant had unsuccessfully sought to justify his refusal of tender.

In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, a suit against Railroad Commissioners and the Attorney General of the state of Texas to restrain enforcement of railroad rates alleged to be confiscatory, was maintained.

See also *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537.

In *Ex parte Young*, 209 U. S. 123, the Attorney General of a state held properly enjoined from insti-

tuting actions or proceedings to enforce penalties and remedies in an act providing for regulation of railroad rates, where the rates were alleged to be confiscatory and the penalties so severe as to lead to the conclusion that they were designed to deter the parties affected from seeking judicial relief.

And see also *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165.

Philadelphia Co. v. *Stimson*, 223 U. S. 605. It seems that a bill will lie by the owner of riparian rights against the Secretary of War to enjoin the establishment without statutory authority, of harbor lines which would diminish the use and value of the plaintiff's property.

And see *Goltra* v. *Weeks*, 271 U. S. 536.

In *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, suit was maintained against the Secretary of the Interior and Commissioner of the Land Office for the protection of a right of way from an order of revocation outside of defendants' jurisdiction.

And see *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Payne* v. *Central Pacific Railway Company*, 255 U. S. 228.

Suit was maintained against the Postmaster General to enjoin exclusion from the mail, in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

In *Johnson* v. *Lankford*, 245 U. S. 541, action against a State Bank Commissioner for neglect of duty was held not an action against the State.

In *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, a bill against the State Board of Valu-

ation and Assessment and the Attorney General and his assistants to enjoin collection of franchise taxes was maintained.

In the *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318, a suit against a Secretary of State and his assistant to enjoin order of revocation of license held not to be a suit against the State.

In *State of Colorado* v. *Toll, Superintendent of The Rocky Mountain National Park,* 268 U. S. 228, a suit against a superintendent of a National Park, claiming his acts derogated from the power of the State, held not a suit against the United States.

The foregoing illustrative cases show the wide scope and utility in our system of constitutional jurisprudence of the doctrine of the personal liability of public officers. And the very breadth and extent of the field in which this salutary doctrine has functioned for the protection of constitutional rights, discloses the vast amount of mischief which may be done if legislatures, state and national, were permitted to exempt all public officers from liability and leave the citizen the slender thread of security afforded by the privilege of suing a sovereign—a thread liable to be snapped in any moment of public stress by merely voting to withdraw the consent of the sovereign to be sued.

Suppose in each of the above cases, the assumption is made that prior to the time the injury occurred a statute had provided that, in such a situation, the officer should be guilty of no legal wrong, but the sovereign should be liable and that suit might be entered in the courts against the sovereign?

And suppose further, that after the cause of action accrued, that consent had been withdrawn?

There seems no limit to the mischief which may be worked by the destruction of the personal liability of public officers. Especially in the field of taxation, where impositions may be collected by distraint, before liability is determined, is the individual in a defenseless position if the challenged doctrine prevails.

Congress might impose a direct tax, not apportioned, on every individual in the country, enforce payment by distraint, and having spent the money thus obtained, withdraw its consent, previously given, to be sued for refund.

IV.

A PERSON INJURED BY THE ENFORCEMENT OF AN UNCONSTITUTIONAL STATUTE IS NOT BOUND TO RELY ON THE LEGISLATIVE BODY MAINTAINING IN GOOD FAITH A REMEDY AGAINST THE SOVEREIGN.

Certain situations have always arisen, and always will arise, in which a person injured by governmental action must bring suit against the sovereign or be remediless. The most common is where he has loaned money to the sovereign in return for a promise to pay, and the promise is broken by direction of the legislature, or pursuant to a change in a fundamental law. Since he cannot hold public officers, in absence of express stipulation, liable on the bond or other obligation executed by them on behalf of the sovereign, nor the legislators for passing a repudiating statute or failing to make appropriations, or compel the fiscal officers in the absence of an appropriation, to pay money from the treasury, he is usually without redress. There is no personal act, in simple repudiation cases, for which any officer can be held individually liable. Consequently, action must be against the state, virtually or by name. If fiscal or other officers are made defendants, it is not because they have taken property from the plaintiff, but because it is sought to compel them as officers, as instruments of the state, to administer the relief prayed for. Such proceedings are still deemed to be against the sovereign, or the sovereign is regarded as an indispensable party, if the suit is in equity. Cf. *Louisiana v. Jumel,* 107 U. S. 711.

Since the doctrine of sovereign immunity protects also the property of the sovereign, an attempt to divest the title or destroy the property (as distinguished from a possessory action) is within its prohibition. Cf. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Christian* v. *Atlantic & N. C. R. R.*, 133 U. S. 233; *Belknap* v. *Schild*, 161 U. S. 10; *Minnesota* v. *Hitchcock*, 185 U. S. 373.

In some cases, relief is denied because to grant it would necessitate directing and controlling by judicial decree the discretion of executive officers. Cf. *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.

The above elements are often present in combination.

Where a person has bought the bonds of a state or of the United States, or has entered into a contract which calls for the payment of money to him, he has parted with something of value voluntarily, trusting the good faith of the sovereign. But in the field of taxation, and in the regulatory field generally, what is surrendered to the state is not surrendered voluntarily, but because of the power of the state to enforce its laws. In the first case, if the state fails to carry out its obligation, repudiation results; in the second case, the property is lost through confiscation. In cases of confiscation there is no voluntary acceptance of the risk of the remedy which the sovereign may provide for the enforcement of the obligation to make compensation. The injured person ought not to be obliged to rely upon the good faith of the sovereign to maintain a remedy against itself. He is entitled to a right and remedy against the enforcing officer.

It may be urged in argument, on behalf of the de-

fendant, however, that it is not to be assumed that the sovereign will repudiate its obligations, or withdraw a remedy against itself, once given, for an admitted wrong.

There are three answers to this argument.

The first is, as already stated, that an individual aggrieved by an act of confiscation ought not to be obliged to take less, when he is entitled to more. He ought not to be obliged to rely upon an act of bounty, when he is entitled according to the theory of the common law to a right and remedy against the officer personally who has committed the injury.

The second answer is, that the philosophy of the founders did not embrace trust in government. Every constitution, state and national, reflects the fear of usurpation, of the encroachment by one department on another, of invasion of civil rights. An elaborate system of checks and balances was devised, and bills of rights were framed, to protect the people from government. The *constitutional* safeguards of the bills of rights were not designed to be metamorphosed into protection according to the *legislative* pleasure. Where the framers of our constitution did not trust government, shall we, nursing an illusion of the never-failing justice of legislative bodies, surrender rights the Founders designed to protect?

The third answer is that judicial history of the use to which sovereign immunity has been put provides a factual refutation. Legislative control over sovereign immunity has frequently been exerted to aid in the breach of public faith.[1]

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[1] The origin and history of sovereign immunity has been the subject of learned discussion which need not be repeated here. (Cf. *Chisholm* v. *Georgia*, 2 Dall. 419; *Briggs* v. *Light-Boats*, 11 Allen 157; *United States* v. *Lee*, 106 U. S. 196; *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 353.)

The economic motive which has given energy to the doctrine of sovereign immunity in this country appeared before the Constitution was ratified. Hamilton in the Federalist, considering the original jurisdiction of the Supreme Court of cases in which the state shall be a party, said:

> "... It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; ..." (*Federalist*, No. 81, Ford's Edition, p. 545).

In spite of Hamilton's opinion that the suggestion was ill-founded, the Supreme Court held in *Chisholm v. Georgia, supra,* in 1792, that it had jurisdiction over an action by two citizens of South Carolina, executors of a British creditor, against the State of Georgia.

The decision met with widespread dissent which culminated in the adoption of the Eleventh Amendment. This dissent was based in part upon fear of "consolidation", but the economic motive was the originating cause of the attack:—

> "While this opposition to the Court's decision was to some extent based on divergencies of political theories as to State sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion.' In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other

credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts."

(Warren, *Supreme Court in U. S. History*, vol 1, page 99.)

The war between the states brought in its wake impoverishment of the South, dishonest administration of reconstruction, a frenzy of speculation, and ultimate panic and depression.

"... Owing to the devastation due to the Civil War, the corruption of their 'carpet-bag' Legislatures and the financial depression after the panic of 1873, many Southern States had attempted to default in the payment of bonds issued or guaranteed by them. The extent of this repudiation had become a National scandal. 'Today more than $100,000,000 and, if we include interest, more than $200,000,000 are due to creditors from repudiating States. . . . The whole country is in disgrace by reason of this horrid spectacle,' said the *Independent*, in 1883. 'Public morality has suffered from the foul contagion. Municipal corporations have caught the disease. . . . Repudiation is simply the highwayman's morality. When practiced by States, it is power against right. As an exhibit of sovereignty, it is the sovereignty of rascality. State repudiation in this country is a criminality that has behind it millions of offenders. The people are the State and control its action.' "

(Warren, *op. cit, supra* vol. 3, pp. 385, 386.)

A number of cases involving repudiation reached the Supreme Court, of which *Louisiana* v. *Jumel*, 107

U. S. 711, may be mentioned, because of the extent of the precautions taken at the time of the issuance of the securities to prevent a successful repudiation.

The foregoing discussion, while suggestive rather than exhaustive, is sufficient to rebut any claim, proferred by government or its agents, that it is fair and reasonable to assume that a remedy, once given, will not be withdrawn to prevent the enforcement of a vested right.

Sovereign immunity is an established principle.[1] When invoked in certain cases, its application is inevitable, however unfortunate the results.[2] But it is a doctrine alien to our form of government, which is based upon the sovereignty of the people, not of a personal ruler. Whatever utility may be theoretically ascribed to sovereign immunity, its enforcement in our judicial history has been largely to aid in the breach of public faith.

The assertion that "the legislature will do no wrong" is refuted by records of the past which create no new illusions. A blind belief that never will "history repeat itself" should not lead us voluntarily to commit to that "tyranny of the majority," believed by the Founders to be inherent in unrestrained legislative control, the measure of security in life, liberty and property which the "People of the United States" intended to place beyond that hazard.

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[1] As commonly asserted, the doctrine of sovereign immunity has three branches: (a) that the sovereign is immune from suit unless it consents, and only so long as its consent is continued, and the title to its property cannot be disposed of in judicial proceedings to which it is not a voluntary party; (b) that the legislative department has *sole power* to give, condition or withdraw the consent of the sovereign, and (c) that in expressing the sovereign's will in this matter the legislature is as free from control as would be the sovereign, i.e. the people, speaking with more authentic voice through a *constitutional* provision.

We are not of course, here considering the immunity of foreign sovereigns in our courts, which is a distinct doctrine.

[2] We do not mean that it is *desirable* that the law respecting sovereign immunity remain static. A measure of judicial control has been exerted, e.g., by applying the principle of estoppel by deed where the sovereign's proprietary interest was involved; also with respect to the immunity of a quasi-sovereign territorial unit, election to submit to jurisdiction of a court has been held binding. It seems that the doctrine of estoppel and election might, with desirable effect, be applied more widely, in cases where consent has been relied on and rights vested. No impairment of the doctrine of the liability of public officers may, consistently with the security of fundamental rights, be hazarded;—emphatically not, in the present state of the law.

V.

THE DOCTRINE OF THE PERSONAL LIABILITY OF PUBLIC OFFICERS IS FUNDAMENTAL IN OUR SYSTEM OF CONSTITUTIONAL JURISPRUDENCE, AND ESSENTIAL TO THE EFFICACY OF CONSTITUTIONAL GUARANTEES OF SECURITY IN PROPERTY.

The decisions previously cited have shown the wide field within which the doctrine of the personal liability of public officers has been applied.

We have selected three quotations from opinions rendered in this Court as a medium for setting forth the fundamental importance in our limited form of government of the doctrine that officers must answer individually for their acts, which under color of authority but in excess of power, are the means by which the evil of usurped power is brought home to the individual, to his damage.

In *Marbury* v. *Madison,* 1 Cranch 137, 164-165 (1803), Chief Justice Marshall said:

> ". . . Is it to be contended that the heads of departments are not amenable to the laws of their country?
>
> "Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. 3, p. 255, says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law,

> in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.' "

The decision in *United States* v. *Lee,* 106 U. S. 196, is according to an excellent authority "regarded as one of the glories of American law" (Warren, *op. cit. supra* vol. 3, pp. 395-396). The son of General Robert E. Lee brought an action of ejectment to recover possession of eleven hundred acres which had been bid in by the United States Government at a tax sale during the Civil War and later used as a national cemetery, which was at the time of the suit in the possession and under the control of military officers placed in charge by the President. Upon proof that the tax sale was invalid, judgment of possession was awarded to the plaintiff. Mr. Justice Miller, delivering the opinion of the majority of the Court, said, referring to the Fifth Amendment:

> "Undoubtedly those provisions of the Constitution are of that character which it is intended the Court shall enforce, when cases involving their operation and effect are brought before them".

Referring to the defense that the Court was without jurisdiction because the action was virtually against the United States Government, he said

> ". . . It seems to be opposed to all the principles upon which the rights of the citizen when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him

but the alternative of resistance, which may amount to crime." (pp. 218-219.)

With respect to the objection that the official position of the defendants endowed them with immunity, he said:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

> "If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." (pp. 220-221.)

The doctrine of *United States* v. *Lee* was applied in the leading case of *Poindexter* v. *Greenhow*, 114 U. S. 270. The decision in this case was one which grew out of the

> ". . . notorious Mahone-Riddleberger legislation in Virginia, by which the State had practically repudiated $11,000,000 out of a refunded debt of $30,000,000, had cut in half the interest on its outstanding bonds, and had repealed the provisions of law which made coupons on its bonds receivable in payment of taxes." (Warren, *op. cit. supra* vol. 3, p. 388.)

Justice Matthews delivering the opinion of the majority of the Court, referring to *United States* v. *Lee*, *Meigs* v. *McClung*, *Wilcox* v. *Jackson*, *Brown* v. *Huger* and *Grisar* v. *McDowell*, *supra*, said:

> "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act

of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence." (p. 288.)

And again,

"In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation." (p. 290.)

* * * *

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say *'L'État c'est moi.'* Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it." (p. 291.)

Nothing, of course, need be added to the words of these judges so eloquently and earnestly repudiating the suggestion that public officers enforcing unconstitutional statutes to the injury of the rights of individuals, are not amenable to the laws of the country.

VI.

DANGER TO PRIVATE RIGHTS IS ALSO INHERENT IN THE DOCTRINE OF "APPARENT VALIDITY" FAVORED BY THE COURT OF APPEALS.

The Court of Appeals commits itself to the support of the proposition that the Collector ought not to be liable for collecting a tax under an unconstitutional Act of Congress, for collections made prior to the time that the Act has been judicially declared to be unconstitutional. It questions the general applicability of the doctrine of *Norton* v. *Shelby County*, 118 U. S. 425, 442. *Norton* v. *Shelby Co.* has been, however, cited with approval in other situations: *Chicago, Indianapolis & Louisville Ry. Co.* v. *Hackett*, 228 U. S. 559, 566. Cf. *Hopkins* v. *Clemson College*, 221 U. S. 636, 642-4.

The far reaching consequences of adopting the view of the Court of Appeals are apparent. If a public officer may successfully defend upon the ground that he relied upon the apparent validity of a statute, no actionable wrong can exist until the challenged statute has been declared unconstitutional. Consequently, until then, no action for damages against the officer may be maintained and no bill in equity for an injunction will lie. The effect of such a doctrine would be substantially as threatening to the security of private rights as to hold that a proceeding against the officer is a proceeding against the sovereign, or that the officer is exempted from liability by his official position.

The general, the orthodox, rule denies force to "apparent validity" as a defence by the public officer.

In the following cases, "apparent validity" existed, but it was not a good defence by a public officer in a suit for a money judgment brought by a member of the public aggrieved by the officer's acts.

Atchison & C. Ry. Co. v. *O'Connor* (*Secretary of State*) 223 U. S. 280 (1911);

Dennison Manufacturing Co. v. *Wright* (*Comptroller General*) 156 Ga. 789 (1923);

First National Bank of Sturgis v. *Watkins* (*Auditor General*) 21 Mich. 483 (1870);

Cunningham et als. v. *Munroe, Administrator* (*of Estate of Superintendent of Alien Passengers*) 15 Gray 471 (1860).

The converse case, where a member of the public seeks to use "apparent validity" in support of a claim, is distinguishable. In this class falls the *de facto officer* doctrine.

In *State of Maine* v. *Poulin*, 105 Me. 224 (one of the cases relied on by the Court of Appeals), the Court said:

> "The *de facto* doctrine is exotic, and was engrafted upon law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duty of an office without being lawful officers. It would be unreasonable to require the public to inquire into the title of an officer, or compel him to show title, and these have become settled principles in law." (p. 410.)

Compare with the case last cited *Gross* v. *Rice*, 71 Maine 241, where the warden of a state prison was held liable in an action for false imprisonment for detaining a convict, under the apparent authority of a statute held unconstitutional.

Cases cited by the Court of Appeals are cases in which the *de facto officer* doctrine was applied, and are inapplicable outside of that limited field.

VII.

THE DESTRUCTION OF THE PERSONAL LIABILITY OF FEDERAL PUBLIC OFFICERS WOULD RESTRICT JUDICIAL REVIEW TO A FIELD DEFINED BY CONGRESS AND THUS IMPERIL THE INTEGRITY OF OUR CONSTITUTIONAL SYSTEM.

The destruction of personal liability of public officers, by giving an opportunity to close the door to litigation designed to prove that power has been usurped in violation of the Constitution, necessarily restricts the scope of the operation of judicial review, and thereby imperils the integrity of our constitutional structure.

The power of judicial review, so firmly established, requires no defense. Without it, the "tyranny of the majority" so greatly feared by the founders of our government, might in any season of national stress over-ride the separation of governmental powers, the division of powers between the federal and state governments, and the constitutional rights of individuals. But we can not refrain from inserting at this point the words of an ex-President of the United States, Woodrow Wilson, as quoted by this tribunal:

> "It is also necessary that there should be a judiciary endowed with substantial and independent powers and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government.
>
> "Indeed there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our

definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual.

"Our courts are the balance-wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty." (Woodrow Wilson, *Constitutional Government of the United States*, pp. 17, 142, quoted in *Evans* v. *Gore*, 253 U. S. 245, 251-2.)

Since the judicial power of the United States extends only to "cases and controversies" (*Chicago &c. Railway Co.* v. *Wellman*, 143 U. S. 339, 344-345), any artificial diminution of the flow of litigation into the courts diminishes the opportunity for the exercise of this function, and thereby imperils our constitutional safeguards.

Although suits may be brought only to protect a private interest, it is recognized that the public interest involved in maintaining a constitutional right may be more important than the private interest to be protected by the litigation. (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.)

Hence it may be not only the right but the duty of the citizen to resist the enforcement of an unconstitutional law. (cf. *O'Donoghue* v. *United States*, 289 U. S. 516, 533-4.)

But neither the interest nor the duty of an injured person, nor the importance of the public interest at stake, will be of any avail, if legislatures, state or national, have power to strike down all law under which a right of action may arise against a person holding public office, to hold him accountable for acts done under color of authority, and ordain that the only rights which may arise in any situation of governmental usurpation, shall be rights against the sovereign. There will be no remedy that can be made to endure except through the beneficence of the body responsible for the usurpation.

Except in the relatively small class of cases in which the government might be obliged to become the actor in an action, in which case unconstitutionality might be pleaded as a defense, the opportunity to vindicate the public interest and private right against legislative encroachment would seldom be exercised

except in the uncontrolled discretion of the body responsible for the challenged legislation.

The public and private consequences of the doctrine of the Court of Appeals condemn it utterly. History has not instructed us to rely with confidence upon the willingness of public bodies to submit their conduct to judicial review. It was not the purpose of the framers of the Constitution to create a government under which the Congress might say what acts enacted by it, and alleged to be *ultra vires,* might be made the subject of judicial review, and what might not. In ordaining that the Constitution should be the "supreme law of the land", the Founders did not mean that it should be the supreme law of the land in such cases as the Congress might permit it to be the supreme law of the land, and cease to be the supreme law of the land whenever the Congress might wish otherwise. The ability to submit, or not to submit, the acts of Congress to judicial review at the mere pleasure of Congress, is of the very essence of arbitrary power.

The debates in the Federal Convention, and the history of the times, beginning with the speech of James Otis on the Writs of Assistance, show that it was expected that the courts would preserve the checks and balances in the Constitution and prevent that centralization of power in the hands either of the executive or of the legislative department, which was deemed in the political philosophy and experience of the day to spell tyranny. The general design was to create a "government of laws and not of men",—a government of limited and not of arbitrary power.

To foster that benign purpose should be the aim of every citizen, and of every officer sworn to uphold the Constitution. But, without judicial review by an in-

dependent judiciary, the evil results of the will to power, of the insistent pressure of economic groups, and of every other disintegrating and distorting influence, will be greatly magnified. And to the extent that the natural flow of litigation involving constitutional issues dwindles, in the same degree will the harmonizing and restraining influence of the judiciary become less and less. And if the course of our public law, by eliminating the personal liability of public officers, eventually permits the sovereign to become the sole possible defendant in all cases where the individual is brought into conflict with his government, in that day the courts will exercise in constitutional review, little more power than Congress shall be willing to permit them to exert. As to the individual, he will perhaps have a few rights left, the invasion of which by usurped power he may vindicate without leave of the legislative branch. The great body of rights which our forefathers sought to protect, for all time, against every abuse of governmental power, will have been swept away in the winds of "sovereign immunity".

Respectfully submitted,

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